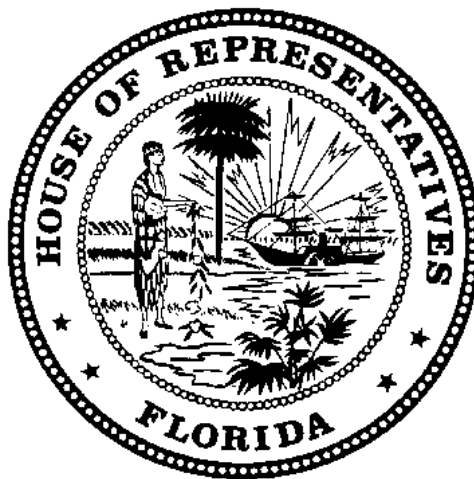


Firearm Laws Relating to Persons Ordered to Undergo Involuntary Outpatient Treatment

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**The Florida House of Representatives
Marco Rubio, Speaker**

PROBLEM STATEMENT

The recent shooting at Virginia Tech resulted in widespread criticism over the fact that the alleged perpetrator was able to obtain a firearm despite having been ordered to receive outpatient mental health treatment. Since this incident, there has been public discussion as to whether Florida law would allow a person who has been ordered to receive similar treatment to legally purchase a firearm.

QUESTION PRESENTED

Does Florida law currently allow persons who have been ordered to undergo involuntary outpatient placement to legally purchase a firearm?

SHORT ANSWER

Under current law, it is possible that persons who have been ordered to undergo involuntary outpatient placement may legally obtain a firearm.

Section 790.065, F.S., precludes persons who have been “adjudicated mentally defective” from legally purchasing a firearm. However, due to slight variances in the applicable statutes, a person who has been ordered into involuntary outpatient treatment may not qualify as having been “adjudicated mentally incompetent” as defined by s. 790.065, F.S., and thus would not be prohibited from purchasing a firearm.

Additionally, s. 790.065, F.S., precludes persons who have been “committed to a mental institution” by a court from legally purchasing a firearm. In defining the term “committed to a mental institution,” s. 790.065, F.S., specifically includes persons who have been ordered to undergo involuntary *inpatient* placement in the definition, but does not specifically include those who have been ordered to undergo involuntary *outpatient* placement. Without specifically including involuntary outpatient placement in the definition of “committed to a mental institution,” it is possible that a person ordered to undergo such placement would be permitted to legally obtain a firearm.

Should the Florida Legislature decide to preclude such persons from legally obtaining a firearm, it is recommended that s. 790.065(2)(a)4.b., F.S., be amended to specifically include involuntary outpatient placement, as defined in s. 394.4655, F.S., to the definition of “committed to a mental institution.”

ANALYSIS

I. Federal and State Firearm Laws

Gun Control Act of 1968

The Gun Control Act (Act) of 1968¹, was one of the most significant pieces of federal gun control legislation passed within the last 50 years. Prompted by the assassination of President John F. Kennedy, the Act created numerous regulations that prohibited persons from selling firearms to

¹ Pub. L. No. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. §§ 921-928).

certain groups of people (e.g., persons known or reasonably believed to be a felon). Over time, the federal law has been amended and the list of persons prohibited from purchasing a firearm has grown. In its current form, 18 U.S.C. 922, provides the following:

It is unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person:

- Is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
- Is a fugitive from justice;
- Is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
- Has been adjudicated as a mental defective or has been committed to any mental institution;
- Who, being an alien—
 - o Is illegally or unlawfully in the United States; or
 - o Except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));
- Has been discharged from the Armed Forces under dishonorable conditions;
- Who has renounced his United States citizenship;
- Is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that—
 - o (a) Was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and
 - o (b) Includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or, by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or
- Has been convicted of a misdemeanor crime of domestic violence.

Brady Act

In November 1993, the Brady Handgun Violence Prevention Act² (Brady Act) was signed into law. Among the Brady Act's numerous provisions is the requirement that federal firearms licensees³ (FFLs) request background checks on individuals attempting to purchase a firearm.⁴ In an effort to

² Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. §§ 921-925A).

³ 18 U.S.C. 923 sets forth the requirements necessary to obtain a federal firearms license. The Federal Firearms Licensing Center, a branch within the Bureau of Alcohol, Tobacco, Firearms and Explosives, is responsible for licensing firearms manufacturers, importers, collectors, and dealers, and implementing related legislation.

⁴ *Id.*

enable FFLs to comply with this requirement, the Brady Act mandated that the United States Attorney General establish the National Instant Criminal Background Check System (NICS).⁵

The NICS⁶ is a national system that checks available records in the National Crime Information Center, Interstate Identification Index, and the NICS Index to determine whether prospective firearm purchasers are disqualified from receiving firearms.⁷ When an FFL contacts the NICS to request a background check on a potential firearm purchaser, the system responds within 30 seconds providing an immediate answer as to whether the transfer of a firearm would violate state or federal law.⁸

Currently, the Federal Bureau of Investigation's (FBI) NICS Section provides full service to FFLs in 30 states and five U.S. territories, and the District of Columbia.⁹ In addition, thirteen states have agencies acting on behalf of the NICS in a full point-of-contact (POC) capacity.¹⁰ These POC states, which have agreed to implement and maintain their own NICS Program, conduct firearm background checks for FFL transactions by electronically accessing the NICS. Florida is a POC state and has designated the Florida Department of Law Enforcement (FDLE) as the point of contact agency.

FDLE's Firearm Purchase Program

In accordance with the Brady Act, Florida law requires FFLs to request background checks on individuals attempting to purchase a firearm. However, since Florida is a POC state, FFLs in Florida contact FDLE's Firearms Purchase Program (FPP) instead of the FBI's NICS section.

Created in 1989, the FPP operates 7 days a week, 363 days a year and is designed to provide FFLs immediate responses to background check inquiries.¹¹ Pursuant to s. 790.065, F.S., FFLs must contact the FPP using a toll-free number to request a criminal history check on potential purchasers prior to selling or transferring a firearm. Upon receiving such request, the FPP immediately reviews the potential purchaser's criminal history record to determine whether the transfer of a firearm would violate state or federal law, and provides a response to the FFL.

II. Prohibition on Selling Firearms to the Mentally Ill

Federal Law

As mentioned above, the Gun Control Act of 1968 provided numerous regulations that prohibit the sale of firearms to certain groups of people. One of these regulations is a prohibition on selling or otherwise disposing of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person has been adjudicated as a mental defective or has been committed to any mental institution.¹²

⁵ *NICS Program Summary*, <http://www.fbi.gov/hq/cjisd/nics.htm>.

⁶ The NICS was developed by the Federal Bureau of Investigation (FBI) through a cooperative effort with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) and local and state law enforcement agencies.

⁷ *NICS Program Summary*, <http://www.fbi.gov/hq/cjisd/nics.htm>.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ s. 790.065, F.S.

¹² 18 U.S.C. 922(d)

The Code of Federal Regulations currently defines the term, “adjudicated as a mental defective” in the following manner:

A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:

- (1) Is a danger to himself or to others; or
- (2) Lacks the mental capacity to contract or manage his own affairs.

The term shall include--

- (1) A finding of insanity by a court in a criminal case; and
- (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.¹³

The term “committed to a mental institution” is defined as:

A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.¹⁴

Florida Law

Florida law largely mirrors federal law in that Florida prohibits licensed importers, manufacturers, and dealers from selling or delivering firearms¹⁵ to those who have been “adjudicated mentally defective” or who have been “committed to a mental institution” by a court.¹⁶ However, Florida’s definitions of the above terms differ slightly than the federal definitions. Florida defines “adjudicated mentally defective” as:

A determination by a court that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease, is a danger to himself or herself or to others or lacks the mental capacity to contract or manage his or her own affairs. The phrase shall include a judicial finding of incapacity under s. 744.331(6)(a), an acquittal by reason of insanity of a person charged with a criminal offense, and a judicial finding that a criminal defendant is not competent to stand trial.¹⁷

¹³ 27 C.F.R. 478.11

¹⁴ *Id.*

¹⁵ “Firearm” is defined in s. 790.001(6), F.S., as “any weapon (including a starter gun) which will, is designed to, or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; any destructive device; or any machine gun. The term ‘firearm’ does not include an antique firearm unless the antique firearm is used in the commission of a crime.”

¹⁶ s. 790.065(2)(a), F.S.

¹⁷ *Id.*

The term “committed to a mental institution” is defined as:

Involuntary commitment, commitment for mental defectiveness or mental illness, and commitment for substance abuse. The phrase shall include involuntary inpatient placement as defined in s. 394.467, involuntary assessment and stabilization under s. 397.6818, and involuntary substance abuse treatment under s. 397.6957, but shall not include a person in a mental institution for observation or discharged from a mental institution based upon the initial review by the physician or a voluntary admission to a mental institution.¹⁸

FDLE's Mental Competency Database

In 2006, Florida enacted House Bill 151, which required FDLE to compile and maintain an automated database of persons who are prohibited from purchasing a firearm based on court records of adjudications of mental defectiveness or commitments to mental institutions.¹⁹ Codified in s. 790.065(2)(a), F.S., the bill also required clerks of court to submit such records to FDLE, and authorized FDLE to disclose the collected data to federal governmental agencies and other states for use exclusively in determining the lawfulness of a firearm sale or transfer.²⁰

In an effort to comply with the above statutory requirements, FDLE created the Mental Competency (MECOM) database. As noted above, clerks of court are required to submit²¹ court records of adjudications of mental defectiveness and commitments to mental institutions to FDLE within one month of the adjudication or commitment.²² These records are then uploaded into the MECOM database,²³ and are accessed by the FPP as part of the screening of potential firearm purchasers.

III. Involuntary Outpatient Placement

Section 394.4655, F.S., entitled “Involuntary Outpatient Placement,” (IOP) was enacted in 2004 in response to a 1998 incident involving the killing of a Florida sheriff by a person with a history of schizophrenia. Unlike the involuntary *inpatient* placement statute, which requires that people with mental illness be sent to and detained at a treatment facility²⁴, the involuntary *outpatient* placement statute establishes a process that allows individuals with mental illness who meet certain criteria to be ordered by the court to participate in *community-based* mental health treatment.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Currently, clerks submit such records either by directly inputting them into the MECOM database, or by faxing or mailing the records to FDLE for input into the database.

²² As of July, 2007, Florida clerks have entered 4,283 records into the MECOM database.

²³ FDLE also uploads the records into the NICS.

²⁴ *See* s. 394.467, F.S.

Criteria for Involuntary Outpatient Placement.

There are numerous criteria that must be met before a person is eligible to be ordered into IOP. Section 394.4655, F.S., provides that a court must find by clear and convincing evidence that:

- The person is 18 years of age or older;
- The person has a mental illness²⁵;
- The person is unlikely to survive safely in the community without supervision, based on a clinical determination;
- The person has a history of lack of compliance with treatment for mental illness;
- The person has:
 - At least twice within the immediately preceding 36 months been involuntarily admitted to a receiving or treatment facility as defined in s. 394.455, F.S., or has received mental health services in a forensic or correctional facility. The 36-month period does not include any period during which the person was admitted or incarcerated; or
 - Engaged in one or more acts of serious violent behavior toward self or others, or attempts at serious bodily harm to himself or herself or others, within the preceding 36 months;
- The person is, as a result of his or her mental illness, unlikely to voluntarily participate in the recommended treatment plan and either he or she has refused voluntary placement for treatment after sufficient and conscientious explanation and disclosure of the purpose of placement for treatment or he or she is unable to determine for himself or herself whether placement is necessary;
- In view of the person's treatment history and current behavior, the person is in need of involuntary outpatient placement in order to prevent a relapse or deterioration that would be likely to result in serious bodily harm to himself or herself or others, or a substantial harm to his or her well-being as set forth in s. 394.463(1), F.S.;
- It is likely that the person will benefit from involuntary outpatient placement; and
- All available, less restrictive alternatives that would offer an opportunity for improvement of his or her condition have been judged to be inappropriate or unavailable.

If a court concludes that a person meets the above criteria, the court must issue an order for IOP for a period of up to six months.²⁶

It should be noted that IOP order are rarely issued. The Florida Mental Health Institute, which receives copies of IOP orders,²⁷ reported that only 22 IOP orders were issued in 2005, and only 35

²⁵ Section 394.455(18), F.S., defines “mental illness” as “an impairment of the mental or emotional processes that exercise conscious control of one's actions or of the ability to perceive or understand reality, which impairment substantially interferes with a person's ability to meet the ordinary demands of living, regardless of etiology. For the purposes of this part, the term does not include retardation or developmental disability as defined in chapter 393, intoxication, or conditions manifested only by antisocial behavior or substance abuse impairment.”

²⁶ s. 394.4655(6)(b), F.S.

²⁷ Section 394.4655(6)(b), F.S., requires service providers to send copies of IOP orders to the Agency for Health Care Administration (AHCA). The Baker Act Reporting Center at the de la Parte Florida Mental Health Institute receives this data on behalf of AHCA.

were issued in 2006 (compared with approximately 2,187 involuntary *inpatient* orders issued in 1996).²⁸ Complete data for 2007 was unavailable at the time of this report.

IV. Whether Persons Ordered Into Involuntary Outpatient Placement May Legally Purchase a Firearm

As discussed above, Florida law prohibits persons who have been “adjudicated mentally defective” or who have been “committed to a mental institution” from purchasing a firearm. However, determining whether someone who has been ordered to undergo IOP also meets the definition of “adjudicated mentally defective” or “committed to a mental institution” requires examination.

Whether someone ordered into involuntary outpatient placement also meets the definition of “adjudicated mentally defective.”

A comparison of the IOP criteria and the definition of “adjudicated mentally defective” reveals why a person ordered into IOP may not always be deemed to have been “adjudicated mentally defective.”

The criteria for involuntary outpatient placement require that a person have a mental illness and:

- (1) Be unlikely to survive safely in the community without supervision, based on a clinical determination; and
- (2) Have, at least twice within the immediately preceding 36 months been involuntarily admitted to a receiving or treatment facility as defined in s. 394.455, F.S., or has received mental health services in a forensic or correctional facility; or Engaged in one or more acts of serious violent behavior toward self or others, or attempts at serious bodily harm to himself or herself or others, within the preceding 36 months;

In comparison, the definition of adjudicated mentally defective requires that a person, as a result of a mental illness, be *a danger to himself or herself or to others or lacks the mental capacity to contract or manage his or her own affairs*. While the language may appear similar, the IOP criteria do not specifically contain the “adjudicated mentally defective” requirement that a person be “a danger to themselves or others or lack the capacity to manage their own affairs.” Consequently, it is possible that a person who meets the IOP criteria may not be deemed “adjudicated mentally defective,” and could legally purchase a firearm.

It should be noted that a judge could include language in an IOP order stating that the subject of the order was a “danger to themselves or others or lacked the capacity to manage their own affairs.” In such instances, the order would appear to meet the definition of “adjudicated mentally defective” and the subject would be prohibited from purchasing a firearm. However, unless such language is included, the subject of the order would likely not meet the definition of “adjudicated mentally defective” and the prohibition of purchasing firearms would not apply.

²⁸ *Special Report of Involuntary Outpatient Placement and Involuntary Inpatient Placement Data*, Florida mental Health Institute, August, 2007.

Whether someone who has been ordered into involuntary outpatient placement also meets the definition of “committed to a mental institution.”

A comparison of the IOP criteria and the definition of “committed to a mental institution” also reveals why a person ordered into IOP may not always be deemed to have been “committed to a mental institution.”

Section 790.065, F.S., defines “committed to a mental institution” is defined as “involuntary commitment, commitment for mental defectiveness or mental illness, and commitment for substance abuse.” The definition includes “involuntary inpatient placement as defined in s. 394.467, involuntary assessment and stabilization under s. 397.6818, and involuntary substance abuse treatment under s. 397.6957.”²⁹ Of note is that the definition specifically includes persons who have been ordered to undergo involuntary *inpatient* placement, but omits those who have been ordered to undergo involuntary *outpatient* placement. Without specifically including IOP in the definition of “committed to a mental institution,” it is possible that a person ordered to undergo such placement falls outside of the definition of “committed to a mental institution,” and would be permitted to legally purchase a firearm.

Prohibiting individuals ordered to undergo involuntary outpatient placement from legally purchasing a firearm.

As explained above, individuals who have been ordered to undergo IOP may currently be able to legally purchase a firearm in the state of Florida. Should the legislature desire to change this and ensure such persons are barred from purchasing a firearm, it is recommended that s. 790.065(2)(a)4.b., F.S., be amended to specifically include IOP in the definition of “committed to a mental institution.”

CONCLUSION

The recent massacre that took place on Virginia Tech’s campus illustrates why it is important for states to examine their firearm laws to determine whether mentally ill persons who have been ordered by a court to undergo outpatient treatment are legally able to purchase a firearm. Florida’s involuntary outpatient treatment statute is designed to ensure that individuals with mental illness who meet certain criteria to be ordered by the court to participate in community-based mental health treatment. Whether such individuals should be allowed to legally purchase a firearm is a policy decision for the Florida Legislature. However, as the preceding analysis reflects, it is possible that such individuals could legally purchase a firearm under current law.

Should the Florida Legislature decide to preclude such persons from legally obtaining a firearm, it is recommended that s. 790.065(2)(a)4.b., F.S., be amended to specifically include involuntary outpatient placement, as defined in s. 394.4655, F.S., to the definition of “committed to a mental institution.”

²⁹ s. 790.065, F.S.